DUNPHY v. KLEINSMITH AND DUER.

1. A complaint which is in form and substance such a complaint as is made in "a creditor's bill," is a case of equitable jurisdiction, and one requiring equitable relief as distinguished from legal.
2. In a Territory of the United States where the systems of common law and chancery are found as separate systems, chancery can alone give relief on such a bill.
3. If a case presented by a creditor's bill is tried like a common law case; that is to say by a jury, and a decree is entered on the verdict as a mere conclusion of law upon the facts found, and not as the result of the chancellor's own judgment, though of his judgment aided by the finding, it is error.
4. A decree on a creditor's bill, which makes the defendant who has cooperated with the debtor responsible for damages which the creditor has suffered in consequence of the conveyance sought to be avoided, is erroneous. On such a proceeding he is liable but to account. If damages are sought against him they should be sought by a proceeding at law.

APPEAL from the Supreme Court of the Territory of Montana.

The case was that of a creditor's bill filed by Kleinsmith, one appellee, against E. M. Dunphy, the appellant, and one Benajah Morse, surviving partner of Elkanah Morse, on behalf of himself and all other judgment creditors, to obtain satisfaction of a judgment recovered by Kleinsmith on the 12th of March, 1868, for $16,957. The bill alleged that an execution issued on the judgment was returned wholly unsatisfied, and that no part of the judgment had been paid. It then charged that on the 31st of October, 1867, Morse and his brother Elkanah (then living) executed to Dunphy a mortgage to secure the payment of $30,000 in one year from date, covering property to the amount of $70,000, including a ranch in the county of Gallatin, containing 640 acres of land, with two-thirds of the crops and all the stock thereon, embracing 225 head of cattle, and all the goods in their store at Gallatin, together with the lot and storehouse and all the book accounts and evidences of debt of E. & B. Morse. The bill stated that at the time of executing this mortgage the Morses were largely indebted to different persons, and

Statement of the case.

charged that it was made to hinder, delay, and defraud the creditors of the firm, and was not accompanied by change of possession; but that the Morses continued in possession for several months, selling and disposing of the goods for their own benefit. It further charged that the Morses did not owe Dunphy any such amount as $30,000; did not, in fact, owe him more than $6000 or $7000, the balance being fictitious; and that both Dunphy and the Morses had acknowledged as much to different persons. The bill further charged that, by means of this fraudulent mortgage and fictitious debt, Dunphy had prevented the plaintiff and other judgment creditors of E. & B. Morse from collecting their just demands; that Dunphy had claimed title to the property under the mortgage, and had forbidden the sheriff to levy upon it, and that consequently the sheriff had refused to do so, and that Morse and Dunphy were engaged in disposing of the property, and that Dunphy had already got more than $30,000 therefrom. The bill prayed that the mortgage might be declared fraudulent and void; that a receiver should be appointed to hold the property, and that if what was left should not be sufficient to satisfy the complainant and other judgment creditors, Dunphy might be made personally liable for the deficiency. By an amended bill the complainant alleged that, on the 3d of January, 1868, Morse executed to Dunphy an assignment of all the property embraced in the mortgage, and authorized him to sell and dispose of it with due regard to his own interests and the interests of the creditors of E. & B. Morse; but that, notwithstanding the assignment, Morse still continued in possession and control of the property for several months, and to sell the same and collect the proceeds thereof; and that the assignment was fraudulent and void.

To this bill Dunphy filed an answer, insisting on the *bona fides* of his debt, and setting forth that it consisted of $12,500 for a stock of goods sold to the Morses, and $10,000 for money lent to them at the date of the mortgage, the balance being for interest to accrue during the year the mortgage had to run, namely, one per cent. a month on the former

sum, and five per cent. a month on the latter, which was allowed by the laws of the Territory. The appellee, Duer, recovered a judgment against Morse on the same day that Kleinsmith's was entered, failed to obtain satisfaction, and filed a petition to intervene as a co-complainant in the suit, and was admitted to intervene accordingly. The cause was put at issue and came on for trial in March, 1869.

It appeared that by an act of the Territorial legislature of Montana, passed in December, 1867, it was declared:

"SEC. 1. That there shall be in this Territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs."

And,

"SEC. 155. That an issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as provided in this act."

By another act, passed in January, 1869, it was provided:

"That in all civil cases, if three-fourths of the jurors agree upon a verdict, it shall stand and have the same force and effect as if agreed upon by the whole of the jurors."

The cause was tried in pursuance of these provisions of the Territorial law. In order to present distinct issues for trial the court framed a series of questions (twenty-two in number), and submitted them to the jury: as

"1*st*. Did E. & B. Morse retain possession and control and continue to dispose of the property mortgaged after the execution of their mortgage to E. M. Dunphy on the 31st day of October, 1867?

"2*d*. State whether B. Morse, after the 3d day of January, 1868, continued to remain in possession of the property assigned to Dunphy, and also to exercise control over it, and to sell and dispose of it?

"4*th*. Did E. & B. Morse owe E. M. Dunphy $30,000 at the time of the execution of their mortgage to him on the 31st day of October, 1867?

"*9th.* Did the mortgage to Dunphy prevent the collection of the judgments of Kleinsmith and Duer?

"*17th.* Was the mortgage to Dunphy executed and accepted for the purpose of covering up the property of E. & B. Morse, and delaying or preventing the collection of demands found against them or either of them?" &c., &c.

To all these questions nine of the jury returned answers adverse to Dunphy and favorable to the complainants, and three dissented.

This verdict was rendered on the 25th of March, and accepted by the court, and on the 3d of April a decree was made, which, after reciting the principal findings of the jury, proceeded as follows:

"It is therefore ordered, adjudged, and decreed that the said mortgage from E. & B. Morse to E. M. Dunphy for $30,000 be set aside as fraudulent and void, and of no effect, and that the said plaintiffs recover of the said E. M. Dunphy the sum of $35,737, the amount of plaintiffs' judgments, interest, and costs, together with the costs of this action, taxed at $7149; that the said judgments be credited by the money in the possession of the receiver in the above cause, and that plaintiffs have execution against the said Dunphy for the residue of said judgment after such credit has been entered."

This judgment was rendered in the District Court for the third judicial district of the Territory. It was taken to the Supreme Court and affirmed. An appeal was then taken to this court.

The principal question presented by this case was whether these proceedings, conducted in the manner stated, could be sustained.

By the organic act constituting the Territory of Montana, passed by Congress May 26th, 1864, section 6, the legislative power of the Territory was declared to extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of that act. By the 9th section provision was made for establishing various courts of the Territory, namely, a Supreme Court, District

Courts, Probate Courts, and justices of the peace; and it was enacted that the Supreme and District Courts, respectively, should possess chancery as well as common-law jurisdiction. By the 13th section it was declared that the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the Territory as elsewhere in the United States.

These were the only provisions of the organic law which were referred to in the argument.

Mr. Lyman Trumbull, for the appellant; Messrs. F. A. Dick, J. O. Broadhead, and A. M. Woolfolk, contra.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court, as follows:

From the provisions of the organic law, which have been referred to in the argument, it is apparent that the Territorial legislature has no power to pass any law in contravention of the Constitution of the United States, or which shall deprive the Supreme and District Courts of the Territory of chancery as well as common-law jurisdiction.

This case was clearly a case of chancery jurisdiction, and one necessarily requiring equitable, as distinguished from legal, relief. The property, according to the charge of the complainant, had been put beyond the reach of the ordinary process of the law. It had been disposed of by the assistance and through the co-operation of Dunphy in such a manner that the judgment creditors could not find it to satisfy their claims, or, if found, it was held by Dunphy under cover of an assignment, which, *primâ facie*, gave him the legal title. This is what is charged by the judgment creditors. They further charge that this was a fraudulent contrivance to hinder and delay them in the recovery of their debts. In a country or territory where the systems of common law and chancery both substantially prevail, it is perfectly clear that chancery only could give adequate relief in such a case. And, then, the case was instituted and the pleadings were framed strictly in accordance with this view. The bill is strictly a bill in chancery praying for equitable relief.

Now, it is perfectly obvious that, with the exception of the verdict being rendered by nine jurors, the trial was altogether conducted as a trial at common law, and that the decree was rendered on the verdict precisely as a judgment is rendered on a verdict at common law. This was clearly an error. The case, being a chancery case, and being instituted as such, should have been tried as a chancery case by the modes of proceeding known to courts of equity. In those courts the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury. Here the judgment is pronounced as the mere conclusion of law upon the facts found by the jury.

Again: In an equitable proceeding of this kind, a decree in the nature of a judgment for damages cannot be rendered against the defendant who is alleged to have taken a fraudulent assignment of the property. The decree against him must be a decree for an account. He must be called to account for just what property has come into his hands, and no more; and he will be entitled, under ordinary circumstances, to a rebate for the amount that was justly and honestly his due. The mode of taking such an account is well known in equity proceedings. The defendant is to exhibit an account either in his answer or in the master's office, and if it is not satisfactory to the complainant, it may be surcharged or falsified; and, as the account is finally found to stand, so will the responsibility of the defendant be. But if the complainant wishes to make him answerable in damages, either for the waste of the property or for its disposal by the original proprietor by aid of the wrongful complicity of the defendant, he must sue for damages in an action at law.

No account of the kind, or in the manner indicated, seems to have been taken at all. The suit was tried like an action for damages, and the jury were left to say, in brief, whether

or not the complainants could have made their money on execution had it not been for the mortgage and assignment to the defendant. The jury answered that they could, and the defendant was made personally liable for the whole amount.

Without attempting to decide whether the Territorial legislature had or had not the power to legalize a verdict rendered by three-fourths of a jury, we think the proceedings were erroneous, and the decree must be REVERSED and the cause remanded for further proceedings

IN CONFORMITY WITH THIS OPINION.

THE CHEROKEE TOBACCO.

1. The 107th section of the Internal Revenue Act of July 20, 1868, which enacts that "the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not," applies to and is in force in the Indian Territory embraced within the Western District of Arkansas, and occupied by the Cherokee nation of Indians, notwithstanding the 10th article of the prior treaty of 1866, between the United States and that nation, by which it was agreed that "every Cherokee Indian and freed person residing in the Cherokee nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory."
2. An act of Congress may supersede a prior treaty.

ERROR to the District Court for the Western District of Arkansas; the case involving, first, the question of the intention of Congress, and, second, assuming the intention to exist, the question of its power, to tax certain tobacco in the territory of the Cherokee nation, in the face of a prior treaty between that nation and the United States, that such tobacco should be exempt from taxation.

The case was elaborately argued orally or on briefs, by *Messrs. E. C. Boudinot, A. Pike, R. W. Johnson, and B. F.*